

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

LARRY HOWELL,

Petitioner,
v.

D. SCUTT,

Respondent,

Case No. 2:07-CV-13643
HONORABLE GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

**OPINION AND ORDER HOLDING IN ABEYANCE THE PETITION FOR WRIT
OF HABEAS CORPUS AND ADMINISTRATIVELY CLOSING THE CASE**

Larry Howell, ("Petitioner"), presently confined at the Cotton Correctional Facility in Jackson, Michigan, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he challenges his conviction for operating a motor vehicle while intoxicated causing death, M.C.L.A. 257.625(4).

Respondent has filed an answer, which is construed as a motion to dismiss on the ground that petitioner has failed to exhaust all of his claims in the state courts.

See Davis v. Lafler, No. 2008 WL 1808823, * 1 (E.D. Mich. April 21, 2008).

Petitioner has not filed a reply to the state's answer. For the reasons stated below, *in lieu* of dismissing the petition, the Court will hold the petition in abeyance and will stay the proceedings under the terms outlined below in the opinion to permit petitioner to return to the state courts to exhaust his claims, failing which the petition shall be dismissed without prejudice. The Court will also administratively close the case.

I. Background

Petitioner pleaded *nolo contendere* to the above charge in the Wayne County Circuit Court, in exchange for which the prosecutor dismissed charges of second-degree murder, manslaughter with a motor vehicle, and negligent homicide against petitioner. Petitioner was sentenced to seven to fifteen years in prison. Petitioner's conviction was affirmed on appeal. *People v. Howell*, No. 269654 (Mich.Ct.App. June 13, 2006); *lv. den.* 477 Mich. 916; 722 N.W. 2d 820 (2006).

Petitioner seeks a writ of habeas corpus on the following grounds:

I. Petitioner's conviction was obtained by [a] plea bargain agreement of no (sic) contendere which was unlawfully induced or not made voluntarily with complete understanding of the nature of the charge and length of guidelines as well as explanation, which were the final consequences of the no contendere plea.

II. Petitioner's conviction obtained by use of agreement unknowing circumstances and factual explanation of sentencing guidelines by attorney S. Woodside.

III. Petitioner's conviction obtained by unconstitutional failure of prosecution and appointed counsel to disclose to petitioner evidence favorable to petitioner during conviction.

IV. Denial of effective assistance of counsel at Circuit Court level as well as retained counsel throughout appeal proceedings.

II. Discussion

The instant petition is subject to dismissal because it contains several claims which have not been exhausted with the state courts.

As a general rule, a state prisoner seeking federal habeas relief must first exhaust his available state court remedies before raising a claim in federal court. 28 U.S.C. § 2254(b) and (c). See *Picard v. Connor*, 404 U. S. 270, 275-78 (1971). The Antiterrorism and Effective Death Penalty Act (AEDPA) preserves the traditional exhaustion requirement, which mandates dismissal of a habeas petition containing claims that a petitioner has a right to raise in the state courts but has failed to do so. See *Welch v. Burke*, 49 F. Supp. 2d 992, 998 (E.D. Mich. 1999). Although exhaustion is not a jurisdictional matter, “it is a threshold question that must be resolved” before a federal court can reach the merits of any claim contained in a habeas petition. See *Wagner v. Smith*, 581 F. 3d 410, 415 (6th Cir. 2009). Therefore, each claim must be reviewed by a federal court for exhaustion before any claim may be reviewed on the merits by a federal court. *Id.* Federal district courts must dismiss mixed habeas petitions which contain both exhausted and unexhausted claims. See *Pliler v. Ford*, 542 U.S. 225, 230 (2004)(citing *Rose v. Lundy*, 455 U.S. 509, 510, 522 (1982)).

Petitioner’s first, second, third, and a portion of his fourth claims are unexhausted for various reasons.

First, petitioner never presented his first, second, or third claims to the Michigan courts. In his first and second claims, petitioner contends that his *nolo contendere* plea was not voluntarily made because his attorney coerced him into believing, based upon her personal relationship with the judge, that petitioner

would be sentenced above a sentencing guidelines range of ten to fifteen years in prison if he did not accept the plea. In his third claim, petitioner contends that the prosecution and defense counsel both withheld exculpatory evidence from him prior to him entering his *nolo contendere* plea. Petitioner never raised any of these claims before the Michigan Court of Appeals or the Michigan Supreme Court. Although petitioner raised a claim before the Michigan Supreme Court that his plea was not understandingly or voluntarily made, petitioner claimed before that court that his plea was not understandingly made because the trial court did not inform petitioner that it could void the plea agreement after reading the pre-sentence report.

For purposes of federal habeas review, exhaustion requires that a claim raised in a habeas petition must be presented to the state courts under the same theory in which it is later presented in federal court. *Williams v. Bagley*, 380 F. 3d 932, 969 (6th Cir. 2004). A claim may be considered “fairly presented” only if the petitioner asserted both the factual and legal basis for his claim in the state courts. *See Hicks v. Straub*, 377 F. 3d 538, 552 (6th Cir. 2004). Because petitioner’s three claims concerning the voluntariness of his *nolo contendere* plea were not presented to the state courts under the same factual basis as the claim that was raised before the Michigan Supreme Court, petitioner has failed to exhaust these plea claims with the state courts. *See Morse v. Trippett*, 37 Fed. Appx. 96, 104-05 (6th Cir. 2002).

With respect to petitioner's ineffective assistance of trial counsel claim, petitioner raised before the Michigan Court of Appeals and the Michigan Supreme Court a claim that trial counsel was ineffective for entering into a sentencing agreement that was twice the sentencing guidelines range. To the extent that petitioner is raising additional ineffective assistance of trial counsel claims in his fourth claim, these have not been exhausted with the state courts. A habeas petitioner is required to present to the state courts "the same specific claims of ineffective assistance [of counsel] made out in the habeas petition." *Wyldes v. Hundley*, 69 F. 3d 247, 253 (8th Cir. 1995)(*quoting Tippitt v. Lockhart*, 903 F. 2d 552, 554 (8th Cir. 1990)). Because any additional ineffective of trial counsel claims that petitioner may be raising in his petition are different than the ineffective assistance of trial counsel claim that was presented before the Michigan Court of Appeals, any additional ineffective assistance of trial claims have not been fairly presented to the state courts. See *Caver v. Straub*, 349 F. 3d 340, 346-47 (6th Cir. 2003)(*citing to Pillette v. Foltz*, 824 F. 2d 494, 497 (6th Cir. 1987)); See also *Brandon v. Stone*, 226 Fed.Appx. 458, 459 (6th Cir. 2007).

In addition, petitioner's ineffective assistance of appellate counsel claim has not been properly exhausted with the state courts. A claim of ineffective assistance of appellate counsel is subject to the exhaustion requirement. See e.g. *Coleman v. Metrish*, 476 F. Supp. 2d 721, 732 (E.D. Mich. 2007). Petitioner raised his ineffective assistance of appellate counsel claim for the first time with

the Michigan Supreme Court. Raising a claim for the first time before the state courts on discretionary review does not amount to a “fair presentation” of the claim to the state courts for exhaustion purposes. See *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Because petitioner failed to present his ineffective assistance of appellate counsel claim in his appeal with the Michigan Court of Appeals, his subsequent presentation of this claim to the Michigan Supreme Court did not satisfy the exhaustion requirement for habeas purposes. See *Farley v. Lafler*, 193 Fed.Appx. 543, 549 (6th Cir. 2006); *Schroeder v. Renico*, 156 F. Supp. 2d 838, 844, n. 5 (E.D. Mich. 2001); *Winegar v. Corrections Department*, 435 F. Supp. 285, 288-89 (W.D. Mich. 1977).

An exception to the exhaustion requirement exists only if there is no opportunity to obtain relief in the state courts or if the corrective process is so clearly deficient as to render futile any effort to obtain relief in the state courts. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *Sitto v. Bock*, 207 F. Supp. 2d 668, 676 (E.D. Mich. 2002). A habeas petitioner, however, has the burden of showing that all available state court remedies have been exhausted or that exceptional circumstances exist which would make exhaustion unnecessary. *Doty v. Lund*, 78 F. Supp. 2d 898, 901 (N.D. Iowa 1999).

The mere fact that appellate counsel failed to raise petitioner’s unexhausted claims on petitioner’s direct appeal to the Michigan Court of Appeals would not render exhaustion futile, because petitioner still has available state

court remedies with which to exhaust these claims. See *Gray v. Wingo*, 391 F. 2d 268, 269 (6th Cir. 1967)(petition for writ of habeas corpus which raised claim that court-appointed counsel failed to ask for a new trial or to appeal was properly denied, since petitioner had not availed himself of Kentucky's post-conviction procedures).

The exhaustion doctrine, in the context of habeas cases, turns upon an inquiry of whether there are available state court procedures for a habeas petitioner to exhaust his claims. See *Adams v. Holland*, 330 F. 3d 398, 401 (6th Cir. 2003). Petitioner has an available state court remedy with which to exhaust his claims. Exhausting state court remedies in this case requires the filing of a post-conviction motion for relief from judgment under Michigan Court Rule 6.500. See *Wagner*, 581 F. 3d at 419; See also *Mikko v. Davis*, 342 F. Supp. 2d 643, 646 (E.D. Mich. 2004). Petitioner could exhaust these claims by filing a motion for relief from judgment with the Wayne County Circuit Court under M.C.R. 6.502. A trial court is authorized to appoint counsel for petitioner, seek a response from the prosecutor, expand the record, permit oral argument, and hold an evidentiary hearing. M.C.R. 6.505-6.507, 6.508 (B) and(C). Denial of a motion for relief from judgment is reviewable by the Michigan Court of Appeals and the Michigan Supreme Court upon the filing of an application for leave to appeal. M.C.R. 6.509; M.C.R. 7.203; M.C.R. 7.302. See *Nasr v. Stegall*, 978 F. Supp. 714, 717 (E.D. Mich. 1997). Petitioner, in fact, is required to appeal the denial of his post-

conviction motion to the Michigan Court of Appeals and the Michigan Supreme Court in order to properly exhaust any claims that he would raise in his post-conviction motion. See *e.g. Mohn v. Bock*, 208 F. Supp. 2d 796, 800 (E.D. Mich. 2002).

The Court will hold the petition in abeyance, rather than dismiss it without prejudice, to avoid the possibility that petitioner might be prevented under the one year statute of limitations contained within 28 U.S.C. § 2244(d)(1) from re-filing a petition for writ of habeas corpus following the exhaustion of these issues in the state courts.¹

A common circumstance calling for abating a habeas petition arises when the original petition was timely filed, as was the case here, but a second, exhausted habeas petition would be time barred by the AEDPA's statute of limitations. See *Hargrove v. Brigano*, 300 F. 3d 717, 720-21 (6th Cir. 2002). The U.S. Supreme Court, in fact, has suggested that a habeas petitioner who is concerned about the possible effects of his state post-conviction filings on the AEDPA's statute of limitations could file a "protective" petition in federal court and then ask for the petition to be held in abeyance pending the exhaustion of state post-conviction remedies. See *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005)(citing *Rhines v. Weber*, 544 U.S. 269 (2005)). A federal court may stay a

¹ This Court has the discretion to stay the petition and hold it in abeyance even though petitioner did not specifically request this Court to do so. See *e.g. Banks v. Jackson*, 149 Fed. Appx. 414, 422, n. 7 (6th Cir. 2005).

federal habeas petition and hold further proceedings in abeyance pending resolution of state court post-conviction proceedings, provided there is good cause for failure to exhaust claims and that the unexhausted claims are not “plainly meritless.” *Rhines*, 544 U.S. at 278.

Petitioner’s claims do not appear to be “plainly meritless.” *Wagner*, 581 F. 3d at 419. Further, petitioner may assert that he did not previously raise these claims in the state courts due to the ineffective assistance of appellate counsel. *Id.*, at 419, nn. 4 and 5. Finally, it does not appear that petitioner has engaged in “intentionally dilatory tactics.”

When a district court determines that a stay is appropriate pending exhaustion of state court remedies, the district court “should place reasonable time limits on a petitioner’s trip to state court and back.” *Rhines*, 544 U.S. at 278. To ensure that petitioner does not delay in exhausting his state court remedies, the Court imposes upon petitioner time limits within which he must proceed. See *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002). Petitioner must present his claims in state court by filing a post-conviction motion for relief from judgment with the state trial court within sixty days from the date of this Order. See *id.* Further, he must ask this Court to lift the stay within sixty days of exhausting his state court remedies. See *id.* “If the conditions of the stay are not met, the stay may later be vacated *nunc pro tunc* as of the date the stay was entered, and the petition may be dismissed.” *Palmer*, 276 F. 3d at 781 (internal quotation omitted).

III. ORDER

It is **ORDERED** that petitioner may file a motion for relief from judgment with the state court within **sixty (60) days of receipt of this Court's order**. If petitioner fails to file a motion for relief from judgment with the state courts by that date, the Court will dismiss his petition without prejudice.

If petitioner files a motion for relief from judgment, he shall notify this Court that such motion papers have been filed in state court. The case will then be held in abeyance pending the petitioner's exhaustion of the claims. Petitioner shall re-file a habeas petition within **sixty (60) days after the conclusion of the state court post-conviction proceedings**. Petitioner is free at that time to file an amended habeas petition which contains newly exhausted claims.

To avoid administrative difficulties, the Court **ORDERS** the Clerk of Court to **CLOSE** this case for statistical purposes only. Nothing in this order or in the related docket entry shall be considered a dismissal or disposition of this matter. See *Sitto v. Bock*, 207 F. Supp. 2d at 677.

It is further **ORDERED** that upon receipt of a motion to reinstate the habeas petition following exhaustion of state remedies, the Court may order the Clerk to reopen this case for statistical purposes.

Dated: June 1, 2010

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on
June 1, 2010, by electronic and/or ordinary mail.

S/Josephine Chaffee
Deputy Clerk